# Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd

HIGH COURT (MELAKA) — CIVIL APPEAL NO 12-36 OF 1997
AUGUSTINE PAUL JC
12 DECEMBER 1997

***Civil Procedure*** *— Interpleader summons — Ownership of property seized under writ of seizure and sale — Whether at hearing of interpleader summons, judgment creditor obliged to give evidence to show that goods seized were that of judgment debtor in order to rebut claimant's case*

***Evidence*** *— Burden of proof — Interpleader proceedings — Whether ordinary rules relating to burden of proof applied to interpleader issues as to other proceedings — Whether at hearing of interpleader summons, judgment creditor obliged to give evidence to show that goods seized were that of judgment debtor in order to rebut claimant's case*

The respondent caused a writ of seizure and sale to be issued against the defendant following a judgment obtained against the latter. Amongst the items seized was an air-conditioner unit which was claimed by the appellant. At the hearing of the interpleader summons, the appellant as plaintiff said that the air-conditioner was purchased by her. The air-conditioner had been fixed in the office of the defendant. In cross-examination, she denied that the air-conditioner belonged to the defendant. The respondent did not call any evidence on this issue. In dismissing the claim, the sessions court judge said that the appellant had failed to establish her title to the air-conditioner. The appellant appealed against the decision on a point of law, ie whether at the hearing of an interpleader summons, the judgment creditor is obliged to give evidence to show that the goods seized are that of the judgment debtor in order to rebut the claimant's case.

**Held**, dismissing the appeal:

The ordinary rules relating to burden of proof apply to interpleader issues as to other proceedings. It is settled law that the burden of proof rests throughout the trial on the party on whom the burden lies. The burden of proof will be on the person who has been appointed as plaintiff. The onus of proof rests upon him to show that he has a title to the goods, which justifies his intervention, and such onus can only be satisfied by proof of actual title in himself. Where a party on whom the burden of proof lies has discharged it, then the evidential burden shifts to the other party. What shifts is the responsibility of adducing evidence to discharge that burden. When the burden shifts to the other party, it can be discharged by cross-examination of witnesses of the party on whom the burden of proof lies or by calling witnesses or by giving evidence himself or by a combination of the different methods. No adverse inference can be drawn against that party for failure to give evidence himself. If he does not adduce any evidence when the burden has shifted to him, he will fail. If the party on whom the burden lies fails to discharge it, the other party need not call any evidence. In that event, it will not avail him to turn round and say that the respondent has not established

his. In this appeal, the burden of proof was on the appellant and it was the finding of the sessions court judge that she had failed to discharge the burden on her. In such circumstances, there was no onus on the respondent to lead any evidence (see pp 705E, 706D–G and 707E–H).

**Obiter:**

(1) The incidence of the burden of proof will be reversed where the judgment creditor has been made plaintiff in the interpleader summons proceedings. Such a situation will arise if the claimant was in possession of the goods at the time of seizure (see p 707A).

(2) The procedure relating to interpleader summons should be followed as a preliminary step before the commencement of hearing of an interpleader summons as required by O 13 r 5 of the Subordinate Courts Rules 1980. Rule 5(1) and (2) lay down the directions that the court may give for the conduct of the interpleader summons hearing. They are, inter alia: (a) that an issue between the claimants be stated; (b) that the parties to the issue be determined; and (c) summary determination of the question at issue. The conduct of the interpleader summons before the sessions court judge with the claimant as plaintiff, although no formal order appears to have been made to that effect, is in accordance with law as the goods seized including the air-conditioner were in the possession of the judgment debtor. The failure by the sessions court judge to state the issue for trial did not cause any miscarriage of justice so as to warrant serious consideration as the hearing of the summons proceeded on the basis of such an issue although not expressly framed (see pp 702H–I and 707F–H).

**[Bahasa Malaysia summary**

Penentang menyebabkan satu writ penyitaan dan penjualan dikeluarkan terhadap defendan susulan daripada penghakiman yang diperolehi terhadap defendan. Di antara barang yang disita adalah satu unit hawa dingin yang dituntut oleh perayu. Di pembicaraan saman interplider, perayu sebagai plaintif mengatakan bahawa alat hawa dingin itu telah dibeli olehnya. Alat hawa dingin telah dipasang di pejabat defendan. Dalam pemeriksaan balas, beliau menafikan bahawa alat hawa dingin itu dimiliki oleh defendan. Penentang tidak memanggil sebarang keterangan atas isu ini. Dalam menolak tuntutan, hakim mahkamah sesyen mengatakan bahawa perayu telah gagal membuktikan hakmiliknya kepada alat hawa dingin itu. Perayu merayu terhadap keputusan atas hujah undang-undang, iaitu sama ada di pembicaraan satu saman interplider, si piutang penghakiman wajib memberi keterangan bagi membuktikan bahawa barangan yang disita adalah kepunyaan penghutang penghakiman bagi mematahkan kes pihak menuntut.

**Diputuskan**, menolak rayuan:

Kaedah-kaedah biasa berkaitan dengan beban membukti terpakai kepada isu interplider sebagaimana dengan prosiding lain. Adalah undang-undang mantap bahawa beban membukti sepanjang perbicaraan terletak pada pihak pada mana beban terletak. Beban membukti terletak pada orang yang telah dilantik sebagai plaintif. Beban membukti terletak padanya untuk menunjukkan bahawa dia mempunyai hakmilik kepada barangan berkenaan, yang memberi justifikasi kepada pencelahannya, dan beban begitu hanya boleh dipenuhi dengan bukti hakmilik sebenar dalam dirinya. Di mana suatu pihak pada siapa beban membukti terletak telah melepaskannya, maka beban keterangan beralih kepada satu pihak yang lain. Apa yang beralih adalah tanggungjawab mengemukakan keterangan bagi melepaskan beban itu. Apabila beban beralih kepada pihak yang lain, ia boleh dilepaskan menerusi pemeriksaan balas saksi untuk pihak pada mana beban membukti terletak atau dengan memanggil saksi-saksi atau dengan memberi keterangan sendiri atau melalui gabungan cara-cara yang berbeza. Tiada inferens bertentangan boleh dibuat terhadap pihak itu kerana gagal memberi keterangan sendiri. Sekiranya dia tidak mengemukakan sebarang keterangan apabila beban beralih kepadanya, dia akan gagal. Andainya pihak pada mana beban terletak gagal melepaskannya, pihak yang satu lagi tidak perlu memanggil apa-apa keterangan. Sekiranya ini berlaku, dia tidak boleh berpatah balik dan mengatakan bahawa penentang tidak membuktikan kesnya. Dalam rayuan ini, beban membukti terletak pada perayu dan ia adalah pendapat hakim mahkamah sesyen bahawa dia telah gagal melepaskan beban padanya. Dalam keadaan ini, tiada kewajipan pada penentang untuk mengemukakan apa-apa keterangan (lihat ms 705E, 706D–G dan 707E–H).

**Obiter**:

(1) Insidens beban membukti akan terbalik di mana si piutang penghakiman telah dijadikan plaintif dalam prosiding saman interplider. Keadaan sedemikian timbul jika pihak menuntut memiliki barangan itu pada masa penyitaan (lihat ms 707A).

(2) Prosedur berkenaan saman interplider haruslah dipatuhi sebagai langkah permulaan sebelum permulaan pembicaraan satu saman interplider seperti yang dikehendaki oleh A 13 k 5 Kaedah-Kaedah Mahkamah Rendah 1980. Kaedah 5(1) dan (2) menyatakan arahan yang boleh diberikan oleh mahkamah untuk pengendalian pembicaraan saman interplider. Mereka adalah, antara lain: (a) bahawa satu isu di antara pihak-pihak menuntut dinyatakan; (b) bahawa pihak-pihak kepada isu ditentukan; dan (c) penentuan terus atas persoalan yang menjadi isu. Pengendalian saman interplider di hadapan hakim mahkamah sesyen dengan pihak menuntut sebagai plaintif, walaupun nampaknya tiada perintah formal telah dibuat, adalah menurut undang-undang kerana barangan yang disita termasuk alat hawa dingin adalah

dalam milikan penghutang penghakiman. Kegagalan oleh hakim mahkamah sesyen untuk menyatakan isu untuk perbicaraan tidak menyebabkan apa-apa salah laksana keadilan hinggakan mewajarkan pertimbangan serius kerana pembicaraan saman diteruskan atas dasar isu demikian walaupun tidak dibuat secara nyata (lihat ms 702H–I dan 707E–G).]

**Notes**

For cases on interpleader summons, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1780–1788.

For cases on burden of proof, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 158–359.

**Cases referred to**

*Belcher v Patten* (1848) 6 CB 608 (refd)
*Bentley v Hook* (1834) 2 Dowl 339 (refd)
*Chase v Goble* (1841) 2 M & G 930 (refd)
*Coote v Braham* (1848) 3 Exch 183 (refd)
*De La Rue v Hernu Peron & Stockwell Ltd* [1936] 2 KB 164 (refd)
*Development & Commercial Bank Bhd v Lam Chuan Co & Anor* [1989] 1 MLJ 318 (refd)
*Emmott v Marchant* (1878) 3 QBD 555 (refd)
*Gadsden v Barrow* (1854) 9 Exch 514 (refd)
*Gerhand v Montagu & Co (Low & Co, Claimants)* (1889) 61 LT 564 (refd)
*Gugen v Sampson* (1866) 4 F & F 974 (refd)
*International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86 (refd)
*Johara Bi bte Abdul Kadir Marican v Lawrence Lam Kwok Fou & Anor* [1981] 1 MLJ 139 (refd)
*Lott v Melville* (1841) 9 Dowl 882 (refd)
*Lucking v Highway Motel (Carnarvon) Pty Ltd* (1975) 133 CLR 164 (refd)
*Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332 (refd)
*Peake v Carter* [1916] 1 KB 652 (refd)
*Pootey v Goodwin* (1835) 5 Nev & MKB 466 (refd)
*Raja Chandranath Roy v Ramjai Mazumdar* 6 BLR 303 (refd)
*Richards v Jenkins* (1886) 17 QBD 544 (refd)
*Selvaduray v Chinniah* [1939] MLJ 254 (refd)
*Sigma Air Conditioning Sdn Bhd v World Wide Agencies (M) Sdn Bhd* [1980] 1 MLJ 179 (refd)
*Tuan Hj Mustapha Kamal bin Hj Abu Bakar v Abdul Kadir bin Endut & Anor* [1993] 4 CLJ 296 (refd)
*UN Pandey v Hotel Marco Polo Pte Ltd* [1980] 1 MLJ 4 (refd)
*Wong Chong Chow v Pan-Malaysian Cement Works Bhd* [1980] 2 MLJ 75 (refd)
*Yorke v Smith* (1851) 21 LJQB 53 (refd)

**Legislation referred to**

Courts of Judicature Act 1964 s 28(1)
Subordinate Courts Rules 1980 O 13 rr 5, 11, 12

*Ravinathan Mutiah* (*Ravi Mutiah & Co*) for the appellant.
*AC Vohrah* (*Vohrah & Tan Chee Lan*) for the respondent.

**Augustine Paul JC:**

> The plaintiff attached these goods and had them sold on the basis that the goods belonged to the defendant. But what evidence was there to support that contention? None whatsoever except the say-so of the plaintiff's solicitors in the writ of seizure and sale. The plaintiff did not file any affidavit to contradict the affidavits filed by the claimant. Where a case is to be decided on a contest of affidavits, the rule is clear. Material allegations which are not contradicted are deemed to be admitted: See *Tynte v Buller* (1854) 23 LJ Ch 504; 2 WR 309. At the hearing, the claimant's oral evidence that she was the sole owner of the goods was also unchallenged. Per Shankar J in *Overseas Investment Pte Ltd v Anthony William O' Brien & Anor* [1988] 3 MLJ 332 at pp 333–334.

Does that passage convey the meaning that at the hearing of an interpleader summons, the judgment creditor is obliged to give evidence to show that the goods seized are that of the judgment debtor in order to rebut the claimant's case? That is the question to be answered in this appeal pursuant to s 28(1) of the Courts of Judicature Act 1964 from an order made by the learned sessions court judge at the conclusion of the hearing of such a summons.

In the sessions court, the plaintiff (the respondent before me) caused a writ of seizure and sale to be issued against the defendant following a judgment that he had obtained against the latter. Amongst the items seized was an air-conditioner unit which was claimed by the claimant (the appellant before me). At the hearing of the interpleader summons, the appellant as plaintiff said that the air-conditioner was purchased by her at a cost of RM500. She said that the receipt has been misplaced. The air-conditioner had been fixed in the office of the defendant, her father, where she used to go occasionally. She did not reside at the defendant's premises. In cross-examination, she denied that the air-conditioner belonged to the defendant. The respondent did not call any evidence on this issue. In dismissing the claim, the learned sessions court judge said that the appellant had failed to establish her title to the air-conditioner. This prompted the appellant to appeal against the decision on a point of law, that is to say:

> Rayuan ini adalah atas alasan bahawa hakim mahkamah sesyen telah salah dari segi undang-undang kerana hakim seharusnya menerima dan membenarkan tuntutan penuntut di atas kerana tidak ada sebarang keterangan bertentangan langsung yang diberikan oleh pihak plaintif sama ada secara afidavit mahupun keterangan lisan di mahkamah untuk menimbulkan sebarang asas untuk menunjukkan bahawa barang-barang yang dituntut oleh penuntut adalah barang-barang kepunyaan defendan.

The law relating to interpleader summons is governed by O 13 of the Subordinate Courts Rules 1980 ('the SCR'). All references to rules of court hereafter shall be to the said order unless otherwise stated. Where a bailiff who has levied under a writ of execution is in possession of property or its proceeds of sale and he is, or expects to be, sued in respect thereof by two or more persons making adverse claims thereto, he may apply to the court for an order requiring the claimants to litigate their differences and to abide by the court's final order in respect thereof. In these circumstances, he is said to apply to the court for relief by way of interpleader. In a bailiff's interpleader, relief is available to the bailiff where a claim is made by any person, other than the person against whom the process is issued, to any money, goods or other movable property taken or intended to be taken in execution by him under process of the court, or to the proceeds or value of any such property.

Rule 5 which deals with the power of the court in hearing such a summons reads as follows:

> 5 (1) Where on the hearing of an application or a summons under this Order all the persons by whom adverse claims to the subject-matter in dispute (hereafter in this Order referred to as 'the claimants') appear, the Court may order —
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> (a) that any claimant be made a defendant in any action pending with respect to the subject-matter in dispute in substitution for or in addition to the applicant for relief under this Order; or
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> (b) that an issue between the claimants be stated and tried and may direct which of the claimants is to be plaintiff and which defendant.
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> (2) Where —
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> (a) the applicant on a summons under this Order is a bailiff; or
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> (b) all the claimants consent or any of them so requests; or
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> (c) the question at issue between the claimants is a question of law and the facts are not in dispute;
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> the Court may summarily determine the question at issue between the claimants and make an order accordingly on such terms as may be just.
>
> (3) Where a claimant, having been duly served with a summons for relief under this Order, does not appear on the hearing of the summons or, having appeared, fails or refuses to comply with an order made in the proceedings, the Court may make an order declaring the claimant, and all persons claiming under him, forever barred from prosecuting his claim against the applicant for such relief and all persons claiming under him, but such an order shall not affect the rights of the claimants as between themselves.

Rule 5(1) and (2) lay down the directions that the court may give for the conduct of the interpleader summons hearing. They are, inter alia:

(a) that an issue between the claimants be stated;

(b) that the parties to the issue be determined; and

(c) summary determination of the question at issue.

*(a) That an issue between the claimants be stated*

Where the claimants appear on the hearing of an interpleader summons and the matter is not dealt with summarily, the court may order that an

issue between the parties be stated and tried. In this regard, 25 *Halsbury's Laws of England* (4th Ed) says this at p 539:

> The issue may be stated in the order, such as 'whether at the time of seizure by the sheriff the goods, etc were the property of the claimant (plaintiff in the issue) as against the execution creditor (defendant in the issue)'; or directions may be given for the plaintiff in the issue to serve points of claim, with points of defence to be served by the defendant in the issue, and for a reply as may be appropriate.

It is significant to note that in a bailiff's interpleader where the goods seized were in the judgment debtor's possession at the time of the seizure, the form of the issue as a general rule is whether the goods or money or part thereof were the property of the claimant (plaintiff to the issue) as against the execution creditor (defendant to the issue) at the time of the execution of the process, not simply whether the goods or money are the property of the claimant or of the execution debtor (see *Belcher v Patten* (1848) 6 CB 608; *Gadsden v Barrow* (1854) 9 Exch 514; *Lott v Melville* (1841) 9 Dowl 882; *Richards v Jenkins* (1886) 17 QBD 544). The issue should be drawn so as to permit the whole question between the parties to be disposed of without giving either party an opportunity of setting up rights outside the object of the issue (see *Peake v Carter* [1916] 1 KB 652).

*(b) Determination of parties to the issue*

The court, when ordering the issue to be stated, may direct which of the claimants is to be plaintiff and which defendant. The court will say which of the two claimants should be, not a plaintiff in the technical sense of the word, because it is not an action, but in the position of a plaintiff; that is to say, who shall be the claimant who has to make out his case against the other (see *De La Rue v Hernu Peron & Stockwell Ltd* [1936] 2 KB 164). Where the applicant for relief is the bailiff who, as is usually the case, has seized goods in the possession of the judgment debtor under a writ of execution, the claimant is generally made plaintiff, and the execution creditor defendant, in the issue (see *Chase v Goble* (1841) 2 M & G 930; *Yorke v Smith* (1851) 21 LJQB 53 and *Bentley v Hook* (1834) 2 Dowl 339). If, however, the claimant was in possession of the goods at the time of seizure, and not the judgment debtor, the execution creditor will generally be made plaintiff (see *Gerhand v Montagu & Co (Low & Co, Claimants)* (1889) 61 LT 564; *De La Rue v Hernu Peron & Stockwell Ltd*; *Lucking v Highway Motel (Carnarvon) Pty Ltd* (1975) 133 CLR 164). The burden of proof will be on the person who has been appointed as plaintiff. The onus of proof rests upon him to show that he has a title to the goods, which justifies his intervention, and such onus can only be satisfied by proof of actual title in himself (see *Cababe on Interpleader* (3rd Ed) at p 78). In this regard, I refer to *The Supreme Court Practice* 1985 Vol 1 where it says at p 251:

> Which of the claimants is to be plaintiff — Where the applicant for relief is the sheriff, who (as is usually the case) has seized under a writ of execution goods in the possession of the judgment debtor, the claimant is generally made plaintiff, and the execution creditor defendant, in the issue (*Chase v Goble* (1841) 2 M & G 930 per Tindal CJ, at p 935). In such a case, the

> burden of proof is on the claimant to prove his title to the goods or to the possession thereof at the time of seizure. If he can only show that they belonged to a third person, the execution creditor is still entitled to succeed, and is not defeated by the plea of *jus tertii* (*Richards v Jenkins* (1887) 18 QBD 451 (CA)); *De Borbon v Westminister Bank* (1933) 49 TLR 414 (CA)). But, on the other hand, the execution creditor can defeat the claimant by showing that there is a better title to the goods in a third party (ibid). The claimant need not prove that the goods are his absolute property; it is sufficient if he shows a right to possession or such a title or interest in the goods that the sheriff ought not to have seized them (*Belcher v Patten* (1847) 6 CB 608; *Green v Stevens* (1857) 2 H & N 146; *Peake v Carter* [1916] 1 KB 652 at p 655 (CA)). And where the claimant has only an equity of redemption in the goods he proves a sufficient interest to entitle him to succeed in the issue as against the execution creditor, the mortgagee not being a party (*Usher v Martin* (1889) 24 QBD 272. See also *Davey v Williamson & Sons* (1898) 2 QB 194; *Re Rollason* (1887) 56 LT 303). If, however, the claimant was in possession of the goods at the time of seizure, the execution creditor will generally be made plaintiff.

The position is summarized by Abdul Malek Ahmad J (as he then was) in *Development & Commercial Bank Bhd v Lam Chuan Co & Anor* [1989] 1 MLJ 318 at pp 320–321 in the following terms:

> In *Mallal's Supreme Court Practice* by Tan Sri Chang Ming Tat at p 173 it is stated that in a sheriff's interpleader the claimant is as a general rule made the plaintiff and the burden of proof rests upon him where the goods seized were at the time of seizure in possession of the judgment debtor, possession being prima facie evidence of title. If, however, the claimant was in possession at the seizure the burden of proof may be upon the execution creditor thus reversing the ordinary rule and the execution creditor may be made plaintiff.

*(c) Summary determination of the question at issue*

As provided by r 5(2), where the applicant on a summons is a bailiff, or all the claimants consent or any one of them so requests, or the question at issue between the claimants is a question of law and the facts are not in dispute, the court may summarily determine the question at issue between the claimants and make an order accordingly on such terms as may be just. As 25 *Halsbury's Laws of England* (4th Ed) says at p 537:

> Summary determination is a procedure adopted in straightforward cases, particularly where expedition is desirable and the claimant's affidavit sufficiently defines the dispute. It avoids the necessity for an issue to be stated and tried. It is not a procedure which permits the master to deal with matters out of hand (*PBJ Davies Manufacturing Co Ltd v Fahn (Fahn, Claimant)* [1967] 2 All ER 1274, [1967] 1 WLR 1059 (CA)). Thus where the master decides that the case is appropriate for summary disposal the practice is that, having given directions as to any preliminary matters, he will adjourn the summons for hearing with oral evidence before a master. The order need not be drawn up until after the matter is disposed of, unless there is a failure to carry out any of the directions given. If a sheriff is the applicant, he will have the carriage of the proceedings, and will apply for the hearing date and notify the parties. When the matter has been heard and determined, the master indorses his decision on the summons, and his order is drawn up. This will dispose of the whole matter; that is, the dispute between the claimants, the application for relief, and all questions of costs.

In the English rules, the preliminary matters are resolved based on an affidavit which the claimant is required to file. There is no such requirement in O 13. However, the same effect is achieved by the notice of the claimant of property taken in execution as prescribed by Form 29 of the SCR which requires the grounds for the claim to be stated.

Generally stated, the procedure to be followed at the hearing of an interpleader summons is similar to that of an ordinary hearing. This is provided in rr 11 and 12 which read as follows:

> 11 Orders 20 and 21 shall, with the necessary modifications, apply in relation to an interpleader issue as they apply in relation to any other cause or matter.
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> 12 (1) Order 28 shall, with the necessary modifications, apply to the trial of an interpleader issue as it applies to the trial of an action.
>
> (2) The Court by whom an interpleader issue is tried may give such judgment or make such order as finally to dispose of all questions arising in the interpleader proceedings.
>
> (3) The judgment shall be in one of the forms in Form 34.

It follows that the rules relating to discovery, inspection and interrogatories and to the mode of trial apply, with the necessary modifications, in relation to an interpleader issue as they apply in relation to any other cause or matter and to the trial of such an issue as they apply to the trial of an action. The ordinary rules relating to evidence, burden of proof, presumptions and estoppels, both at trial and after it by way of res judicata, apply to interpleader issues as to other proceedings (see *Emmott v Marchant* (1878) 3 QBD 555; *Yorke v Smith* (1851) 21 LJQB 53; *Gugen v Sampson* (1866) 4 F & F 974; *Pootey v Goodwin* (1835) 5 Nev & MKB 466). Thus, for example, the ordinary rules as to hearsay will be enforced (see *Coote v Braham* (1848) 3 Exch 183).

It was the contention of learned counsel for the appellant that the respondent ought to have led evidence to rebut the evidence of the appellant. Failure on the part of the respondent to lead such evidence, he said, is fatal to his case. In support of his argument, he referred to *Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332. Learned counsel relied heavily on that part of Shankar J's judgment where his Lordship said at pp 333–334:

> The plaintiff attached these goods and had them sold on the basis that the goods belonged to the defendant. But what evidence was there to support that contention? None whatsoever except the say-so of the plaintiff's solicitors in the writ of seizure and sale. The plaintiff did not file any affidavit to contradict the affidavits filed by the claimant. Where a case is to be decided on a contest of affidavits, the rule is clear. Material allegations which are not contradicted are deemed to be admitted: see *Tynte v Buller* (1854) 23 LJ Ch 504; 2 WR 309. At the hearing, the claimant's oral evidence that she was the sole owner of the goods was also unchallenged.
>
> In most such cases, the basis of the creditor's right to attach arises from the fact that the circumstances are such that it is reasonable to presume that the defendant is the reputed owner of the goods. Possession is said to be nine-tenths of the law! So if a house is in the exclusive occupation of the defendant, his execution creditor may have some justification to attach. But

where a number of persons are in simultaneous occupation of a house, as for example, one occupied by several wage-earning members, it would be imprudent to assume that everything in the house belongs to the registered owner or even to the nominal head of the family. In the present case, there was no evidence whatsoever before the registrar that the defendant was the owner of the premises or even that he was residing there at any material time. Consequently, the plaintiff had not even laid the foundation for any presumptive ownership in the defendant when the goods were seized.

Instead of holding that the claimant's affidavits and viva voce evidence was unchallenged and uncontradicted, and therefore holding in her favour, the registrar dismissed her claim. This he was able to do by holding that the claimant had not proved to his satisfaction that the goods were hers. In the absence of any evidence whatsoever from the plaintiff, this finding cannot be sustained.

The argument advanced by learned counsel necessitates a consideration of the law relating to burden of proof. It is settled law that the burden of proof rests throughout the trial on the party on whom the burden lies. Where a party on whom the burden of proof lies has discharged it, then the evidential burden shifts to the other party (see *UN Pandey v Hotel Marco Polo Pte Ltd* [1980] 1 MLJ 4; *Wong Chong Chow v Pan-Malaysian Cement Works Bhd* [1980] 2 MLJ 75 and *Johara Bi bte Abdul Kadir Marican v Lawrence Lam Kwok Fou & Anor* [1981] 1 MLJ 139). What shifts is the responsibility of adducing evidence to discharge that burden (see *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86). When the burden shifts to the other party, it can be discharged by cross-examination of witnesses of the party on whom the burden of proof lies or by calling witnesses or by giving evidence himself or by a combination of the different methods. No adverse inference can be drawn against that party for failure to give evidence himself. If he does not adduce any evidence when the burden has shifted to him, he will fail. If the party on whom the burden lies fails to discharge it, the other party need not call any evidence. In that event, it will not avail him to turn round and say that the respondent has not established his. In such circumstances, as the Privy Council observed in *Raja Chandranath Roy v Ramjai Mazumdar* 6 BLR 303, the respondent can say: 'It is wholly immaterial whether I prove my case or not. You have not proved yours' (see *Selvaduray v Chinniah* [1939] MLJ 254). On the question of the failure of a claimant in interpleader proceedings to discharge the burden of proof on him, useful reference may be made to *Sigma Air Conditioning Sdn Bhd v World Wide Agencies (M) Sdn Bhd* [1980] 1 MLJ 179 where Mohd Azmi J (as he then was) said at p 181:

> Where property of a judgment debtor has been attached by a judgment creditor, an objector in objection proceedings must show that he is the lawful owner of the property at time of attachment. If such ownership has been obtained by purchase or otherwise, the court must be satisfied that the transaction is bona fide. In determining whether the transaction is bona fide, it should be decided on the facts of each particular case. In the present case, the objector has failed to show that the purchase is bona fide. As such, the objection has been correctly dismissed.

I must add that the incidence of the burden of proof will be reversed where the judgment creditor has been made plaintiff in the interpleader summons proceedings. As I said earlier, such a situation will arise if the claimant was in possession of the goods at the time of seizure.

In my opinion, the judgment in *Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* does not deviate from the principles that I have just discussed. The passages from the judgment relied on by learned counsel must be read and understood in the context of the whole judgment. It is sufficient for me to just refer to p 334 where Shankar J said:

> The wonder of this case is that the claimant did produce a mass of material before the hearing to support her claim. It is the opinion of this court that even though they had not been properly indexed and cross-referenced, the material produced corroborated her claim that the goods were hers.

It is thus clear that the learned judge made adverse comments on the failure of the plaintiff to give evidence in that case as he was satisfied that the claimant had discharged the burden of proof on her. In my view therefore the law enunciated in *Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* and its progeny *Tuan Hj Mustapha Kamal bin Hj Abu Bakar v Abdul Kadir bin Endut & Anor* [1993] 4 CLJ 296 must be read with caution and as being peculiar to their own facts. But in the appeal before me the burden of proof was on the appellant and it was the finding of the learned sessions court judge that she had failed to discharge the burden on her. In such circumstances, there is no onus on the respondent to lead any evidence.

I interpolate to add that the conduct of the interpleader summons before the learned sessions court judge with the claimant as plaintiff, although no formal order appears to have been made to that effect, is in accordance with law as the goods seized including the air-conditioner were in the possession of the judgment debtor (see *Peake v Carter* and *Lucking v Highway Motel (Carnarvon) Pty Ltd*). The failure by the learned sessions court judge to state the issue for trial did not cause any miscarriage of justice so as to warrant serious consideration as the hearing of the summons proceeded on the basis of such an issue although not expressly framed. In my opinion, the procedure enumerated in the early part of the judgment should be followed as a preliminary step before the commencement of hearing of an interpleader summons as required by r 5(1).

In the upshot, my answer to the question of law raised in this appeal is that there is no obligation on the respondent to offer any evidence as the appellant had failed to discharge the burden on her. Accordingly, I dismissed the appeal with costs.

*Appeal dismissed.*

Reported by Jafisah Jaafar